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No. 91-760

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JOAN PETRONE,
Petitioner,

v.

LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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Respondent Secretary of Health and Human Services (the "Secretary") has opposed review on the grounds that the decision below is correct and that, even if it is not, the issue here is not significant enough to warrant this Court's attention. As we now show, the Secretary misatates the facts and understates the importance of this case.

ARGUMENT

1. The Secretary does not dispute that there is a split of authority on the precise issue presented by this case, although he attempts to downplay it. *See* Opp. 4 ("Although there appears to be some disagreement among the circuits ..."). In fact, the circuit courts are deeply divided on the issue of whether Social Security claimants, whose cases were remanded to the agency under the

Social Security Disability Reform Act, are eligible for attorney's fees under the Equal Access to Justice Act ("EAJA") -- with three circuits going one way, three the other, and one circuit itself divided (Pet. 6-8 & n.*). Even the three circuit court decisions that have adopted a rule denying fees to Reform Act plaintiffs in all circumstances have prompted spirited challenges to that absolute denial approach. *See Petrone v. Sullivan*, 936 F.2d 428, 430-32 (9th Cir. 1991)(O'Scannlain, J. dissenting); *Guglietti v. Sec'y of HHS*, 900 F.2d 397, 405-08 (1st Cir. 1990)(Breyer, J., dissenting); *Hendricks v. Bowen*, 847 F.2d 1255, 1259-61 (7th Cir. 1988)(Easterbrook, J., concurring); *see also Truax v. Bowen*, 842 F.2d 995, 997-99 (8th Cir. 1988)(Heaney, J., dissenting). In short, both the depth of division and the seriousness of the discussion in the appellate courts belie the Secretary's suggestion that this case lacks significance.

2. The Secretary acknowledges that there "may still be some ... individuals" whose entitlement to EAJA fees will be affected if this Court grants review (Opp. 8), but then fails to recognize that the affected class is actually quite numerous. Indeed, the Secretary's own statistics, on the present status of Reform Act remands, while far from clear, indicate that there are 162 claims which have not, to this date, undergone even an initial post-remand *administrative* review, signifying that the number of cases that remain at the judicial review stage, either on the merits or on fees, is far greater still.[1] For example, two reported cases, involving the Secretary's pre-Reform Act termination of disability benefits, and subsequent application of the Reform Act standards, have only very recently been completed *on the merits*. *Nelson v. Sullivan*, 946 F.2d 1314 (8th Cir. 1991)(termination in 1983);

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[1] This figure -- 162 claims still awaiting post-remand review by the Secretary -- is contained in the Secretary's November 21, 1991 response to a September 17, 1991 request under the Freedom of Information Act, 5 U.S.C. § 552, which undersigned counsel provided to counsel for respondent on December 12, 1991. Thereafter, on January 9, 1992, undersigned counsel received an unsolicited telephone call from a Mr. Larry Miller, attorney for the Social Security Administration in Baltimore, Maryland, who stated that the agency's statistics were *underinclusive* because of the Secretary's failure to include all cases remanded under the Reform Act in the statistical database when it was originally created.

Griego v. Sullivan, 940 F.2d 942 (5th Cir. 1991)(termination in 1982). Although the plaintiffs did not gain reinstatement in those cases, for present purposes the import of those decisions is that, logically, if Reform Act cases remain alive on the merits (and they do), even more must exist at the fees stage. That being the case, this Court should grant review to resolve the profound division among the courts of appeals.[2]

3. The Secretary also argues that this Court's denial of certiorari in a similar case, *Kinney, et al. v. Sullivan*, 111 S. Ct. 538 (1990), should foreclose review here. However, in *Kinney*, the Secretary argued that there was no true conflict among the circuit courts, Br. for Resp. in Opp. at 4-8 (filed Nov. 5, 1990), *Kinney v. Sec'y of HHS*, 111 S. Ct. 538 (No. 90-5628), a position that the Secretary has abandoned here (Opp. 4, 8). Moreover, *Kinney* involved two unpublished *per curiam* decisions of the First Circuit, denying fees based on its recent decision in *Guglietti*, where, as the Secretary stressed, the district court had already found that the Secretary's position on the merits was substantially justified. *See Kinney v. Sec'y of HHS*, No. 90-1080, slip op. at 3 (1st Cir. June 7, 1990). Given the unlikelihood that the substantial justification rulings would be overturned, *see Pierce v. Underwood*, 487 U.S. 552, 558-63 (1988), there was considerably less reason to grant review there than here, where it appears that the Secretary's position on the merits was unreasonable (Pet. 3, 12-13) and neither the district court nor the court of appeals ever reached the substantial justification issue (Pet. App. 18a-19a; 6a-7a).

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[2] Because most cases remanded under the Reform Act, both on the merits and with respect to fees, are not published, petitioner is not in the position to report on the precise number of pending fees applications. We are aware, however, of two recently filed applications, where the plaintiff won reinstatement of benefits after a Reform Act remand, thus presenting the same question as this case. *See Mendez v. Sullivan*, No. 83-4871 (E.D. Pa.)(fee application filed Jan. 8, 1992)(noting that Third Circuit has not ruled on "prevailing party" issue); *Bray v. Sullivan*, No. S-91-0116 WBS/PAN (E.D. Cal.)(fee application filed May 8, 1991)(originally No. C-83-3978 JPV). We also note that the Secretary, who *is* in the position to know how many Reform Act cases are pending, has not even attempted to address this question with any specificity.

4. Furthermore, as we have indicated (Pet. 9-10), the question presented here concerns not only the thousands of disability recipients who Congress sought to protect when it enacted the Reform Act, but also more generally whether, and in what circumstances, attorney's fees can be denied to a victorious plaintiff on the ground that a change in the applicable law arguably led to the victory. Although the Secretary decries this formulation (Opp. 8-9), that is precisely how the court of appeals understood this case (Pet. App. 2a)("The question presented by Petrone's appeal is whether a plaintiff whose victory results from a change in the law is a prevailing party within the meaning of the EAJA"). As we maintain (Pet. 12-13), and the Secretary had all but conceded below (*id.* at 13), petitioner would have won her case absent the Reform Act. Indeed, her victory had nothing whatsoever to do with the new Reform Act standards, which were never even applied on remand (*id.* at 3, 12), despite the Secretary's two unsupported statements to the contrary (Opp. 2, 3). The point here, however, is that the Ninth Circuit framed the general issue correctly, although its analysis and result were flawed.

In the petition, we illustrated this point by discussing this Court's recent decision in *Zebley v. Sullivan*, 110 S. Ct. 885 (1990), where automatic court remands and ensuing fees controversies identical to the one here will result from the Secretary's regulations promulgated to implement that decision (Pet. 9). The Secretary responds with the truism that the Reform Act was Congressionally-mandated, while *Zebley* remands flowed from a court decision (Opp. 9-10), but does explain at all why that distinction should make any difference on the EAJA fees question. Indeed, as the Ninth Circuit recognized (Pet. App. 2a), this case has nothing to do with the fact that petitioner's case was remanded, or that the remand was Congressionally-required, but rather concerns the broader question of what effect a change in the law during the pendency of a case should have on the availability of fees to the victorious party. In other words, it is only the fact that the Reform Act changed the standard for disability termination, and not that pending cases were remanded to the Secretary, rather than remaining in the district court, that has caused the differing theories and outcomes among the circuits on the fees issue. *See Hendricks*, 847 F.2d at 1260 (Easterbrook, J.,

concurring).

5. As we have shown, there are many individuals whose cases were remanded under the Reform Act, and whose rights to EAJA fees will be affected if this Court grants review. Not the least of these individuals is petitioner against whom a law, intended to help disabled people regain benefits that were wrongfully terminated, was used to deny her attorney's fees which otherwise should have been forthcoming (Pet. 12-13). In the final analysis, we view the impact of this case very differently than does the Secretary. Several years from now, Reform Act cases may be, in the Secretary's words, "approaching extinction" (Opp. 4). But *before* extinction occurs this Court should decide, for petitioner and many others, whether disability claimants may obtain a fee under the EAJA for the cost of defending against unreasonable governmental action. It is simply unacceptable to do as the Secretary urges, and allow the issue presented here to remain in utter confusion, while individuals such as petitioner, because of the happenstance of their geographical location, lose attorney's fees that may rightly be theirs.

CONCLUSION

For the reasons stated above and in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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